LIM SOOI SEE & ANOR.

v.

KOAY THYE HONG SAWMILL SDN. BHD.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[COMPANIES WINDING-UP NO. 4 OF 1982]
6 FEBRUARY 1984

COMPANY LAW: *Winding-up order under s. 218 (1) (d) - Reduction of members below two - Contravention of ss. 14(1), 36(1) - Application for stay of proceedings - Whether the fact wrongful acts could have been regularised relevant - Whether order under s. 218(1) (d) should be refused as winding-up under s. 218 (1)(i) or s. 181 possible.*

The administrators (the petitioners) of the estate of Koay Thye Hong (the deceased) petitioned for Koay Thye Hong Sawmill Sendirian Berhad (the company) to be wound up pursuant to the provisions of s. 218 (1) (d) of the Companies Act 1965 (the Act), that is on the ground that the number of members of the company had been reduced to below the statutory minimum of two.

The deceased and his brother Koay Hoo Hong, were the only two shareholders and directors of the company. On the death of the deceased on 2 June 1980, Koay Hoo Hong became the sole surviving director and shareholder (the sole shareholder). The company continued to carry on business. On 15 September 1980 the sole shareholder obtained leave of the Court under s. 150 of the Act to convene an extraordinary general meeting for the purpose of appointing additional directors. On 21 October 1981 the sole shareholder held an extraordinary general meeting in the petitioners' absence and elected his second son as director and allotted shares to himself, and his eldest son and second son at an under-value. Since 6 January 1982 the petitioners had applied for their estate to be registered as a shareholder but registration had been delayed. On 19 March 1982 the second petitioner obtained an order for the appointment of a provisional liquidator for the purposes only of taking possession of, collecting, and protecting the company's assets. The sole shareholder then applied for the order appointing the provisional liquidator to be set aside. An order suspending any disposal of the assets of the company pending the hearing of the winding-up petition was made.

The winding-up petition was granted. The Court held:

(1) That the EGM held on 21 October 1981 was invalid for lack of quorum and the appointment of the directors and the allotment of shares were also invalid.

(2) That therefore the company, being a one-member company, was clearly in breach of s. 14 and s. 36 of the Act.

(3) That the circumstances of the case justified the company being wound-up. The circumstances as found by the Court were:

(a) The sole shareholder had acted not only in a dictatorial manner but also fraudulently.

(b) There was clearly an attempt to oust the personal representative of the deceased by delaying registration of the transmission of the shares of the deceased.

(c) There was plainly an attempt to ride rough-shod over the provisional liquidator.

(d) There was a fraudulent disposal of an asset of the company by the sole shareholder.

The sole shareholder applied for a stay of proceeding either altogether or pending the determination of appeal under s. 243 of the Act. Leave was granted to the sole shareholder to argue that the winding-up order was wrongly made.

Held:

[1] There was no reason for the Court to depart from its earlier decision that the company should be wound up. The sole shareholder had himself conceded (a) that the petitioner could have petitioned under s. 218 (1) (i) of the Act as the vital element of trust had ceased to exist between the petitioners and himself; (b) that the matters complained by the petitioners could be construed as oppression, which would have justified winding up under s. 218 (1) of the Act and (c) that the company had been carrying on business in contravention of s. 14 (1) and s. 36 (1) of the Act. The fact that the petitioners could have regularised the acts of misfeasance and nonfeasance did not afford any kind of licence to the sole shareholder not only to flout the law but to abuse his position criminally.

[2] In the circumstances of the case, it was not necessary to order a winding-up under s. 218 (1) (i) or s. 181 of the Act, but had it been necessary, the Court would have had no hesitation in doing so.

Cases referred to:

Scott v. Frank [1940] 3 All ER 508
Baxter v. Eckersley [1950] 1 All ER 139
Ebrahimi v. Westbourne Galleries Ltd. & Ors. [1972] 2 All ER 493

Legislation referred to:

Companies Act 1965, ss. 14(1), 36, 150, 181, 218, 243

Other source referred to:

Pennington's Company Law p. 40, 3rd Edn.

For the 1st & 2nd petitioners - Gan Teik Chee; M/s. Gan Teik Chee & Ho
For the respondent - Tan Phock Kin; M/s. Thillaimuthu & Phock Kin

JUDGMENT

Edgar Joseph Jr J:

By a Petition dated 26 February 1982 and filed on 1 March 1982, Lim Sooi See ("the First Petitioner") and Koay Kean Chooi ("the Second Petitioner") who I shall refer to jointly as the Petitioners, in their capacity as Administrators of the Estate of Koay Thye Hong ("the deceased") prayed that Koay Thye Hong Sawmill Sendirian Berhad ("the Company") be wound up pursuant to the provisions of s. 218 (1) (d) of the **Companies Act** 1965 ("the Act"), that is to say on the ground that the number of members of the company had been reduced to below the minimum of two.

For the sake of clarity and a better understanding of these proceedings, the leading dates and events which preceded the filing of this Petition require to be set out in some tedious detail and may be stated thus "(*vide* paras 3-15)"

According to Petitioners, upon the incorporation of the company on 9 February 1977, the deceased and his brother Koay Hoo Hong (KHH) were the only two shareholders cum directors of the company so that when, on 2 June 1980, the deceased died, KHH became the sole surviving director and shareholder ("the Sole Shareholder"). Despite several warnings from their solicitors that an offence was being committed by reason of the fact that the company was carrying on business with less than the statutory minimum of two members, the Sole Shareholder continued to do so in contravention of s. 36 of the Act and began to

treat himself as the sole proprietor of the company. They therefore lodged reports both with the Ministry of Trade and Industry and the Registrar of Companies but neither took any action.

On 15 September 1980, the sole shareholder obtained leave of Court, pursuant to s. 150 of the Act, to convene an extraordinary general meeting for the purpose of appointing additional directors. The essential terms of this Order were "... that an Extraordinary General Meeting of the company be convened ... AND IT IS FURTHER ORDERED that all the papers, for example, application, affidavit and order be served on the Estate of the deceased Koay Thye Hong before the EGM. ..." (For brevity and convenience, I shall refer to this Order as the Order of Court dated 15 September 1980).

On 2 January 1981, the second petitioner obtained an Order appointing himself to represent the deceased and for an extraordinary general meeting to be convened pursuant to the Order of Court dated 15 September 1980 and that all papers, for example, applications, affidavits and orders be served on the estate of the deceased before the EGM. The essential terms of the Order were "... It Is Further Ordered that the said Koay Kean Chooi be and is hereby appointed to represent the late Koay Thye Hong at any meeting to be convened under the Order of Court made herein on 15 September 1980. (For brevity and convenience I shall refer to this Order as the Order of Court dated 19 March 1982).

On 21 October 1981, the sole shareholder, with the company's secretary, Madam Loh Siew Heoh in attendance, at the office of his solicitor, Mr. V.M. Mohan, purported to hold an extraordinary general meeting in the petitioners' absence and to elect his second son Koay Kean Guan (KKG) as director and to allot 40,000 ordinary shares of RM1/= each to himself, his son KKG and his eldest son, Koay Kean Huat (KKH), at an under value.

It was alleged by the second petitioner in para. 4 of her affidavit, affirmed to on 5 May 1982 (encl. 13), that as the two shares in the company's capital were valued at RM36,657.63, the said shares have been issued at a premium of RM18,328.81 less RM1/= for each share. It was further alleged that the issue of the said shares reduced the estate of the deceased from a fifty per cent shareholder to an insignificant minority shareholder. It was accordingly alleged that the said EGM and all acts carried out pursuant thereto were fraudulent, void and of no effect.

By a letter dated 9 November 1981 addressed to the sole shareholder, the petitioners protested about the EGM on 21 October 1981 contending that it was illegal, void and of no effect for lack of a legal quorum and there being also a contravention of s. 36 of the Act. It was also contended in para. 4 of the second petitioner's affidavit of 5 May 1982 (encl. 13) that the first petitioner did not attend the meeting on 21 October 1981 because the agenda was *ultra vires* the Order dated 15 September 1980 and Article 8 and 92 of the company's Articles of Association and that the sole shareholder was accordingly requested to convene a fresh meeting for the appointment of a replacement director for the deceased but that he refused.

The petitioners also caused an advertisement to be published in the Kwong Wah Yit Poh and Sing Pin Jih Pao, both Chinese newspapers, on 23 January 1982, informing the public that the sole shareholder and his two sons had no right to enter into business transactions on the company's behalf. Despite this, the sole shareholder and his sons continued to manage the company as if they were its legal members and directors.

It was further alleged in para. 5 of the second petitioner's affidavit, affirmed to on 5 May 1982 (encl. 13), that since 6 January 1982 the sole shareholder and the company's secretary had delayed registering their estate as shareholder in order to exclude it from the company's affairs. It was also alleged that as the two equal shareholders in the company could not agree it was in the interests of the company as a whole for it to be wound up.

On 19 March 1982, the second petitioner applied for and obtained an Order (encl. 8), the essential terms of which were "that Albert Khoo Chooi Thuan, the approved Liquidator ... is hereby appointed Provisional Liquidator for purposes only of taking possession of, collecting and protecting the company's assets." (For brevity and convenience I shall refer to this Order of Court dated 19 March 1982).

The sole shareholder then applied by summons-in-chambers on 21 April 1982, supported by affidavit affirmed to on 20 April 1982 (encl. 10), praying that the *ex parte* Order dated 19 March 1982 appointing the provisional liquidator be set aside. For the sake of convenience, I shall reproduce the material parts of this affidavit, omitting formal and introductory matter:

> 5. Subsequent to my brother's death I was the only surviving director and shareholder of the said company.
>
> 6. At that time I was advised that I could not hold meetings of the company (having regard to the fact that I was the only member, shareholder and director) without an Order and Directions of the Court.
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> 7. I did subsequently apply to the High Court, *vide* Penang High Court' Originating Summons No. 416 of 1980 and under s. 150 of the Companies Act 1965, for an order, *inter alia*, that I may be able to convene an Extraordinary General Meeting of the said company with me alone as the quorum. I was granted the said order on 15 September 1980. A copy of the said order is produced and shown to me marked 'A' and annexed hereto. The said order also required me to serve all papers, notices, etc. on the estate of the deceased.
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> 8. Subsequent to this Koay Kean Chooi, the eldest son of the deceased applied to the Court and obtained an order, *inter alia*, that he be appointed to represent the late Koay Thye Hong at any meeting to be convened under the earlier order dated 15 September 1980. The said order dated 2 January 1981 is produced and shown to me marked 'B' annexed hereto. No other order or power was granted to the said Koay Kean Chooi apart from attending meetings.
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> 9. Pursuant to the order of Court dated 15 September 1980, I instructed the Secretary of the company to convene an Extraordinary General Meeting for the purpose of, *inter alia*, assessing the share value of the said company and to appoint additional directors and allotment of shares in the company.
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> 10. The Secretary to the company duly convened the Extraordinary General Meeting on 21 October 1981 at the office of my solicitors M/s. V.M. Mohan at No. 6 Beach Street (Top Floor), Penang. Notice of the said meeting was duly served on the said Koay Kean Chooi pursuant to the order of Court dated 2 January 1981.
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> 11. However, the said Koay Kean Chooi did not attend the Extraordinary General Meeting. I then proceeded and conducted the Extraordinary General Meeting. Copies of the Notice and Minutes of the meeting are now produced and shown to me marked 'C'.
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> 12. The Secretary of the company has duly taken the necessary steps to register the names of the new directors and also the allotment of shares with the Registrar of Companies. The company has since been functioning normally.
>
> 13. Further, all monies paid by the new directors and shareholders of the company have been credited to the Bank account of the company.

14. On 6 January 1982, the solicitors for the estate of Koay Thye Hong, deceased, wrote to the Secretary of the company requesting her to transmit the 1 share of the deceased to Koay Kean Chooi and Lim Sooi See @ Lim Soh See, the said letter dated 6 January 1982 is produced and shown to me marked 'D' and annexed hereto. The Secretary of the company duly submitted to the said solicitors the relevant transfer forms for the administrators to execute the same for purposes of registration of said share in the name of Koay Kean Chooi and Lim Sooi See @ Lim Soh See. The forms have been executed and the Secretary of the company is duly taking steps to register the same.

15. The said Koay Kean Chooi together with his mother Lim Sooi See @ Lim Soh See, without any cause or reason, took out winding-up proceedings against the company vide Penang High Court Companies (Winding-Up) No. 4 of 1982 and the said Winding-Up Petition is fixed for hearing on 24 May 1982. The said petition has been served on the company and the company shall be vigorously contesting the said petition.

16. In the interim, the Petitioners have maliciously and spitefully applied *ex parte* to the Court and obtained an order to appoint a provisional liquidator, without serving the application either to me or my solicitors.

17. I say that the Petitioners' actions for a long time have been to see the dissolution of the company and I further say that the company is functioning normally and there is no reason whatsoever to appoint a liquidator at the moment. The Winding-Up Petition will be heard on 24 May 1982 and until the determination thereof I am of the view that the *status quo* should be maintained.

18. I further aver that the company has always been and is still willing to accept the said Koay Kean Chooi as a director and shareholder. However, for reasons best known to him, the said Koay Kean Chooi has to date refused to accept the appointment of the directorship.

In her answering affidavit affirmed to on 5 May 1982 (encl. 13), the first petitioner said, *inter alia*, this, and again, for the sake of convenience, I shall reproduce its material parts, omitting formal and introductory matter:

2. As to para. 7 and 8 thereof, I say that the Court Order dated 15 September 1980 under Originating Summons No. 416 of 1980 was granted merely for an Extraordinary General Meeting of Koay Thye Hong Sawmill Sdn. Bhd. to be convened under s. 150 of the Companies Act. There was no ancillary direction for the quorum at such Extraordinary General Meeting to be reduced to one. In fact, under prayer 2 of the Originating Summons, the Sole Shareholder and applicant intended to appoint his son, Koay Kean Huat, as a new Director. This prayer was disallowed by the Court, but instead, the applicant was ordered to serve all the relevant papers on the Estate of Koay Thye Hong deceased before convening the Extraordinary General Meeting. Subsequently, upon being served as aforesaid, the said Estate's solicitors obtained the Court Order of 2 January 1981 enabling me to attend the proposed Extraordinary General Meeting as the Estate's representative as Letters of Administration had not been granted to the said Estate.

3. As to para. 18 thereof, I say that for over a year the beneficiaries of the Estate negotiated with the Sole Shareholder (and applicant herein) for Koay Kean Chooi, my co-administrator to be appointed a Director in place of his late father but the applicant refused. Discussions were also held with a view to either party buying out the other's shareholding but the Sole Share-holder delayed the valuation of the shares while continuing to manage the company's sawmill business contrary to s. 36 of the Companies Act. A copy of letter dated 4 March 1981 is produced, shown to me and annexed hereto marked "LSS1". The present winding up proceedings were only commenced as a last resort so as to end the applicant's continued operation of the company's business defiance of the law and in detriment of the estate's interests.

4. As to para. 9 to 13 of the Supporting Affidavit, I say that Koay Kean Chooi did not attend the Extraordinary General Meeting held on 21 October 1981 because the agenda thereof was *ultra vires* the Court Order dated 15 September 1980 and Article 8 and 92 of the company's Articles of Association is produced, shown to me and annexed hereto marked "LSS2". I informed the Sole Shareholder accordingly and told him to convene a fresh Meeting confined to the appointment of a replacement Director for my late husband but he refused. In Koay Kean Chooi's absence and without the requisite quorum as specified in Article 50 of the company's Articles of Association, the Sole Shareholder purported to carry out the Extraordinary General Meeting as set out in the purported Agenda and, *inter alia*, allotted 40,000 ordinary shares of RM1/= each at an undervalue to his 3 sons. As the 2 shares in the company's capital were valued at RM36,657.63 the said shares should have been issued at a premium of RM18,328.81 less RM1/=for each share. A photocopy of letter dated 20 November 1981 is produced, shown to me and annexed hereto marked "LSS3" Furthermore the issue of the said shares rendered the Estate of Koay Thye Hong from a 50% shareholder to an insignificant minority. In the premises, I am advised and verily believe that the said Extraordinary General Meeting and all acts carried out pursuant thereto are fraudulent, void and of no effect.

5. As to para. 14 of the applicant's affidavit, I say that since 6 January 1982 the applicant and the company's Secretary have delayed registering the Estate as a shareholder in order to exclude the said Estate from the company's affairs. Up to date registration has still not been effected.

6. As to para. 15 to 17 thereof, I repeat para. 2 to 5 above and say that the Petitioners herein are fully justified in seeking a winding-up of the company and the appointment of a provisional liquidator. All along the sole shareholder has been adamant in treating the company as his private property. In this connection a copy of letter dated 4 May 1982 as well as the enclosure are produced, shown to me and annexed in one bundle marked "LSS4". As the 2 equal shareholders in the company cannot agree, it is in the interest of the company as a whole for it to be wound up.

7. I therefore pray that the application herein be dismissed with costs.

In his supplementary affidavit in reply, affirmed to on 14 June 1982 (encl. 26), the sole shareholder said, *inter alia*:

3. I applied to the High Court *vide* Penang High Court Originating Summons No. 416/80 for an order, *inter alia*, to convene an extraordinary general meeting under s. 150 of the Companies Act 1965.

4. In the supporting affidavit therein I expressly stated that I am the sole surviving director and shareholder of Koay Thye Hong Sawmill and that the Order of Court was necessary to convene an extra-ordinary general meeting to enable the company to function. The order was granted accordingly. A copy of the said affidavit is now marked and produced and shown to me marked 'A' and annexed hereto.

5. The late Koay Thye Hong (deceased) prior to his death was the managing director of the company and he kept all books and accounts. As such it took me considerable time to considerable time to complete the accounts. Upon my instructions my solicitors M/s. V.M. Mohan on 17 March 1981 wrote to the solicitors for the Petitioners intimating the difficulties encountered with the accounts. A copy of the said letter is now produced and shown to me marked 'B' and annexed hereto.

6. Immediately upon completion of the accounts, I instructed the secretary of the company to convene the Extraordinary General Meeting with the intention of appointing new directors and to allocate shares. My sole intention at all times and still now is to appoint one of the

representatives of the late Koay Thye Hong as a director and shareholder and or to compromise for settlement. Copies of letters of my solicitors negotiating the settlement are now produced and shown to me in one bundle marked "C" and annexed hereto.

7. I had even remitted the Transmission Forms for the Transfer of the share to their solicitors M/s. Gan Teik Chee & Ho but before further development the Petitioners instituted the winding-up proceedings and wrote to me ultimately that the 1 share ought to be transferred as it was necessary to commence legal action. A copy of the said letter dated 28 December 1981, is now produced and shown to me marked 'D' and annexed hereto.

It is therefore conspicuous that the Petitioners has at all times evaded any settlement and intends to wind up the company maliciously knowing well that I have spent my whole labour in the company.

I reiterate that the meeting was conducted legally and that the new directors were appointed accordingly and that the said company is functioning without any contravention to any prevailing laws.

When the application to set aside the *ex parte* order dated 19 March 1982 (encl. 8) appointing the provisional liquidator came before Mr. Judicial Commissioner Mustapha Hussain (as he then was) an Order was made on 10 May 1982 (encl. 32) which, omitting formal and introductory parts reads as follows:

the applicant by his Counsel undertaking that the company's assets shall not be disposed of And the petitioners by their Counsel undertaking that the Liquidator shall not take over the management of the company **It Is Ordered** that no order be made on the application herein **And It Is Ordered** that the hearing of this Winding-Up Petition shall be on the 17 June 1982.

(For brevity and convenience I shall refer to this Order as "the Order of Court dated 19 March 1982.")

Mr. Gan, for the petitioners, submitted that the basic issue was whether the allotment of shares at the EGM of the company held on 21 October 1981 was valid or invalid. He urged that it was invalid on three separate grounds: first, it was *ultra vires* the powers conferred by the Order of Court dated 15 September 1980 both as regards quorum and agenda. It was submitted that although s. 150 of the Act empowered the Court to give a direction that one member present in person or by proxy shall be deemed to constitute a meeting, the Order of Court dated 15 September 1980 did noting of the kind. It merely provided for the personal representative of the deceased to be present at the meeting and to represent the estate. Second, it was *ultra vires* the powers of members to allot shares as, by virtue of Article 8 of the Memorandum and Articles of Association of the company, this power is given solely to the directors. Third, the allotment was a fraudulent exercise of powers since the shares were allotted at an undervalue. Consequently, he contended that if the allotment was invalid, then, the company remained a one member company and this, in law, was not permissible: see s. 14(1) of the Act.

He further urged that the clinching consideration was that the sole shareholder in fact did not wish the children of the deceased to be registered as shareholders. In support, he referred to para. 14 of the affidavit of the Sole Shareholder affirmed to on 20 April 1982 (encl. 9) wherein he states that the Secretary of the company is duly taking steps to register the same. Mr. Gan then made the pungent observation: "Now, 1½ years later she is still duly taking steps to register the children of the deceased as shareholders of the company although

under the Act shares must be registered within one month of transfer being completed." He pointed out that although the Court was here concerned not with a transfer but a transmission of shares there was no distinction in principle between the two as regards this requirement.

Next, my attention was drawn by Mr. Gan to the fact that although a provisional liquidator of the company had been appointed by the Order of Court dated 19 March 1982, the sole shareholder has been ignoring his existence. In support, he referred to para. 6 of the answering affidavit of LSS affirmed to on 5 May 1982 (encl. 13) and to the letter of the provisional liquidator dated 4 May 1982 addressed to the managing director of the company, being Exhibit LSS4, asking, *inter alia*, for a list of all assets of the company, which provoked no reply. Instead, there had been a disposal of assets of the company by the sole shareholder, namely, a motor-car bearing registration number PAC 828, which was transferred to one Foo Yee Fong, some time in late February 1983, in breach of an undertaking given by Mr. Mohan on 10 May 1982 as solicitor for the sole shareholder and in breach of s. 223 of the Act.

In reply, Mr. Mohan for the sole shareholder, submitted that despite a notice of meeting of EGM dated 24 May 1981 the petitioners did not attend the same. He also submitted that the EGM held on 21 October 1981 was perfectly valid because it was held pursuant to an Order of Court dated 15 September 1980 and, therefore, the appointment of additional directors at this meeting was also valid. He then made a somewhat emotional plea that the two shareholders of the company were brothers and had been carrying on a business for twenty years, at first as a partnership and recently as a company. His client had devoted his entire life to the well-being of the company. He accordingly suggested that an independent valuer be appointed to value the shares, assets and liabilities of the company and an option given to the contending parties to either buy or sell each other's shares, as the case may be, in order to ensure that outsiders were excluded. Mr. Mohan was however compelled to concede that if the appointment of an alternate director at the EGM held on 21 October 1981 was void then the company could not exist in view of the provisions of s. 218(1)(d) of the Act. He finally submitted that there was no question of fraud on the part of the sole shareholder as was alleged as whatever was done *bona fide*. He accordingly urged that the petition be dismissed.

I recognised that under s. 218(1)(d) of the Act even when the number of shareholders has fallen below the statutory minimum of two I have a discretion as to whether or not to grant the petition for winding-up. In the first place, I was quite satisfied on the evidence before me, that the EGM held on 21 October 1981 was in fact invalid for lack of a quorum and that the appointment of alternate directors and the allotment of shares by the sole shareholder to himself and his two sons was also invalid. In the circumstances, the company was a one-member company which is prohibited by s. 14 (1) of the Act and where such a company (with less than two members) continues to carry on business, the person who is a member during the time that it so carries on business for a period of more than six months and does so knowingly, shall be liable for the payment of all debts of the company contracted during the time that it so carries on business after the expiry of those six months and may be sued therefor and the company and that member shall be guilty of an offence; see s. 36 of the Act. *Prima facie*, therefore, it would appear to be as much in the interests of the sole shareholder, as it is of the first and second petitioners, that the company be wound up.

Now, having decided that there has been a clear breach of s. 14 (1) of the Act, I had to go on to exercise my discretion under s. 218 (1)(d) of the Act as to whether or not to wind up the company. I was quite satisfied, on the affidavit evidence before me, and on the submissions by Counsel on both sides, that the sole shareholder had acted not only in a

dictatorial manner but also fraudulently when he allocated shares to himself and his two sons at an undervalue (an allegation which at no time had been seriously contested) and when he appointed his sons as alternate directors. There was also clearly an attempt to oust the personal representative from having any say in the affairs and running of the company by stalling the registration of transmission of shares. I fail to see why a simple matter such as this could not be concluded in a matter of days much less months and instead, as events transpired, even after a lapse of eighteen months, the application was still in limbo. There was also plainly an attempt, and a bold one at that, to ride rough-shod over the provisional liquidator appointed by Order of Court dated 19 March 1982. Not only that, there was also a fraudulent disposal of an asset of the company, namely, motor-car No. PAC 828, by the sole shareholder some time in late February 1983. I should have thought that any of these facts would be sufficient to justify the petition being granted but, taken in the aggregate, there was an overwhelming case for winding up the company. As I have said, I regarded the submissions of Mr. Mohan as quite emotional and destitute of merit. He made no attempt whatsoever to answer the specific points of fact and law raised by Mr. Gan.

The next chapter in these proceedings opened with Mr. Tan Phock Kin (who now replaced Mr. Mohan) applying on behalf of the respondent for a stay of proceedings either altogether or, alternatively, pending the determination of appeal under the provisions of s. 243 of the Act. He accordingly asked for, and was granted, leave to argue that my Order for winding up was wrongly made.

He opened by saying that the powers of the Court on the hearing of a petition for winding up were provided for in s. 221 (1) of the Act and were very wide. He then referred to s. 218 (1)(d) of the Act which made it clear that the power to wind up on the ground relied upon by the petitioners was discretionary but the petition left one with the impression that it was mandatory. Next, he referred to s. 36 of the Act which he said was a purely penal provision, not prohibitory in terms.

He then referred to the facts, specifically, para. 6(2)(ii), (iii), (iv) and (v) of the affidavit of the sole shareholder affirmed to on 20 June 1983. As considerable stress was laid on these paragraphs, I shall reproduce them. They read as follows:

> 6(2)(ii) The remaining shareholder who carries on business will be personally liable for the debts of the company if he is aware that the membership of the company remains below the statutory minimum for more than six months.
>
> (iii) It is therefore a provision to protect me and I should be the party to make the application for winding up if I desire protection against personal liability.
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> (iv) However the application was made by the petitioners as personal representatives of the deceased shareholder.
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> (v) Though they can insist on the company registering them as members in respect of the deceased's share, they did not do so but instead apply for the winding up on the grounds that there is only one shareholder.

Mr. Tan then submitted that the combined effect of these paragraphs went to show that the petitioners were taking advantage of their own default, namely, refusing to attend the EGM on 21 October 1981. They could not therefore be heard to contend that the EGM was bad in law, whether for lack of a quorum or otherwise. Mr. Tan also submitted that the petitioners who could have insisted on registration of the shares of the deceased (*Scott v. Frank* [1940] 3 All ER 508) in the names of the personal representatives did not do so, that again they

were taking advantage of their default for the sinister purpose of seeking a winding-up order. He then referred to the Order of Court dated 2 January 1981 which, it will be recalled, provided *inter alia*, for the petitioners, as personal representatives of the deceased, to represent his estate at any EGM to be held under the Order of Court dated 15 September 1980. He submitted that the effect of this Order was to put the petitioners in the position of shareholders so that they could do all that was necessary to protect the interests of the estate. He pointed out that although they were aware of the proposed EGM and knew what was to be discussed there, they studiously refrained from applying to Court to restrain the holding of this meeting on the ground that the agenda was *ultra vires* or they could have attended as representatives and objected to whatever resolution they thought was improper. Instead, they presented a Petition for Winding up saying that the meeting was illegal on the ground of lack of a quorum when they had every opportunity of preventing this from happening. According to Mr. Tan, this again went to show that the petitioners were taking advantage of their own default. He went on to submit that the non-disclosure in the petition of the Order of Court dated 15 September 1980 was misleading because it left one with the impression that the Petitioners were prevented from attending the EGM and that the respondent was acting unilaterally and without notice.

He then referred to the supplementary affidavit of the sole shareholder affirmed to on 14 June 1982 (encl. 26) and, in particular, para. 7 thereof which reads:

> I had even remitted the Transmission Forms for the Transfer of the share to their solicitors M/s. Gan Teik Chee & Ho but before further development the Petitioners instituted the winding up proceedings and wrote to me ultimately that the 1 share ought to be transferred as it was necessary to commence legal action. A copy of the said letter dated 28 December 1981, is now produced and shown to me marked 'D' and annexed hereto.

which, he submitted, showed lack of good faith on the part of the petitioners, in that they had engineered a situation for winding up. This, he said, applied to both the grounds relied on in the Petition, namely, that there was only one member and also that the respondent had acted illegally.

He conceded that although there was no evidence of illegality on the part of his clients in passing the resolution at the EGM of the Company on 21 October 1980 appointing his own son as a director, this was merely an irregularity capable of being cured by the company by adjourning the meeting for one week to have this particular item of business reconsidered and whether or not there was a quorum this would be immaterial regard being had to Article 51 of the Memorandum and Articles of Association of the company, which reads:

> If within half-an-hour from the appointed time for the meeting a quorum is not present, the meeting, if convened, upon the requisition of members, shall be dissolved. In any other case, it shall stand adjourned to the same day in the next week at the same time and place, and if at such adjourned meeting a quorum is not present those members who are present shall be deemed to be a quorum and may do all business which a full quorum might have done.

He then submitted that, on a further ground also, a meeting could have been properly constituted without a quorum and, even if only one member was present, in view of the Order of Court dated 15 September 1980 and Article 51 of the Memorandum and Articles of Association of the company.

Alternatively, he submitted that if he was wrong in this, and one member could not constitute a meeting, it was within the power of the petitioners to put a stop to it by attending the meeting by virtue of the Order of Court dated 2 January 1981 or, alternatively, by applying to the Court for an injunction.

Next, he submitted that the petitioners had a remedy; they could have attended the EGM on 21 October 1981 and voted against the resolution proposing the appointment of the sole shareholder's son as director or as alternate director, thereby creating a deadlock which would open the door to a petition for winding-up under s. 218 (1)(i) of the Act. He accordingly submitted that the inevitable inference was that the petitioners abstained from attending the EGM concerned in order to create a situation which would enable them to allege illegal conduct on the part of the sole shareholder which was curable at their option. He cited *Baxter v. Eckersley* [1950] 1 All ER 139, 142A for the proposition that no man can take advantage of his own default. He accepted that in the circumstances of this case it was the sole shareholder, not the Petitioners, who should be applying for a winding-up order on the ground that there is only one member.

Mr. Gan in reply said that it was open to the petitioners to avail themselves of whatever remedy was available, whether under s. 218 (1)(d) or s. 218 (1)(i). He further said that the fact that the petitioners might have been responsible for certain omissions could not excuse the sole shareholder's wrongful acts. He submitted that the petitioners' absence form the meetings is not material because it did nothing to excuse the illegal acts of the sole shareholder referred to in the petition. On the subject of registration of the deceased's shares in the name of the petitioners as personal representatives, Mr. Gan submitted that they had all along been pressing for this.

He then posed the rhetorical question: "Could a situation be engineered by the petitioners when the company was substantially under the control of the sole shareholder and officers of the company, including its legal adviser, who was all along advising them?" He pointed out that the ommission on the part of the sole shareholder to rescind the resolution passed at the EGM on 21 October 1981 so as to regularise matters showed lack of good faith on the part of the sole shareholder. He said that the stand taken by the sole shareholder was that he was entitled to pass the resolution concerned at the EGM on 21 October 1981. He submitted that the sole shareholder should have adjourned the EGM on 21 October 1981 for lack of quorum and written to the petitioners suggesting that they apply for an injunction restraining the holding of any subsequent meeting or inviting the petitioners to attend an adjourned meeting. He suggested that this is what any person acting *bona fide* would have done. Instead, the sole shareholder took advantage of the petitioners' absence and passed the impugned resolutions with alacrity. He referred to the sole shareholder's subsequent conduct, again saying that although the petitioners had protested after the EGM about its illegality he could have, but did not regularise matters by rescinding the resolution and calling for a fresh meeting. Instead his lawyer replied stating that the sole shareholder was entitled to do what he did.

Mr. Gan pointed out that it had been clearly proved that the sole shareholder and officers of the company refused or neglected to register the petitioners as shareholders. The Grant of Letters of Administration was sent to the secretary for shares to be registered in their names by letter dated 6 January 1982 Exh: D encl. 9. This was legally permissible: see p. 40, 3rd Edn., *Pennington's Company Law*, but the request for registration was ignored. In fact, said Mr. Gan, from the very beginning the petitioners wanted themselves to be registered. However, the sole shareholder chose to ignore this request. The sole shareholder, he said, could have regularised this by registering the personal representatives before appointment of the provisional liquidator, who was appointed on 19 March 1982, but it was too late now to do so.

Mr. Gan then drew attention to the terms of the Orders of Court dated 15 September 1980 and 2 January 1981 and conceded that by virtue thereof an EGM of the company could be held despite the absence of the Board. He argued, however, that far from enabling one member present to constitute a meeting, the Orders, made under the second limb of the ancillary powers of the Court conferred by s. 150 of the Act merely authorised the petitioners to exercise any or all the powers that the deceased member could have exercised if he were present at the meeting. No direction had been given - so the argument ran - that one member present in person or by proxy shall be deemed to constitute a meeting.

Mr. Gan went on to say that the sole shareholder had suggested that the most equitable solution was for any one party to buy out the other in a private auction (para. 9 encl. 56). He submitted, and I think correctly, that the Court had no power to make such an Order since the powers of the Court on the hearing of a petition are laid down in s. 221 and there is nothing therein to authorise the same. Here, the ground on which winding-up was ordered was not because of oppression but because there was only one shareholder. Section 181 (2)(c) which provides for sale and purchase of shares applies only to cases of oppression. Mr. Gan then pointed out that the cases cited (see p. 687 *Pennington*, 3rd Edn.) could be distinguished because in those cases winding up orders were made owing to insolvency and subsequent to which creditors were paid whereas here the ground on which the Order was made was because there was only one shareholder.

Mr. Gan also said that he had no objection to a stay pending further Order and then dealt with Mr. Tan's submission on s. 36 of the Act which, it will be recalled, was that the section merely created an offence but did not prohibit persons in the position of the sole shareholder from carrying on the business of the company. Mr. Gan observed that this was a startling proposition. It was submitted that the sole shareholder had no right to carry on business and this was emphasized by the appointment effect of dismissing the Board. Mr. Gan wound up his submission by stressing that the sole shareholder had flouted the law by ignoring the Orders of the Court and, instead of appointing the deceased's children as replacement directors, issued shares at an undervalue to himself and his sons thereby converting the Estate of the deceased from a 50 percent shareholder to an insignificant minority. There was also his refusal to register the personal representatives as shareholders and a steadfast refusal to cease business from 2 December 1980, that is to say, six months after the death of the deceased: (see s. 36 of the Act.). The sole shareholder also had applied, though unsuccessfully, to set aside the appointment of the provisional liquidator. There was also his refusal to hand over accounts and papers to the provisional liquidator. In short, the sole shareholder had vigorously resisted all attempts by the petitioners to seek redress.

Mr. Tan, in his final reply, drew attention to the terms of the Order dated 19 March 1982 appointing the provisional liquidator (encl. 8) and stressed that it was only for the limited purpose of taking possession and protecting the assets of the company; in other words, he was appointed merely to preserve the *status quo* and, for this purpose, to prevent the company from disposing of its assets. Mr. Tan further submitted that since the death of the deceased, his widow had been receiving RM500/= per month from the sole shareholder even up to now. He once again drew attention to s. 36 of the Act and pointed out that it was purely a penal provision which did not prohibit the carrying on of business by the company. The section, he said, was merely intended to protect the interests of the members who continue to run their business after the membership had fallen below the statutory minimum.

Mr. Tan then submitted that the facts showed that the failure to register the deceased's share in the names of the petitioners as representatives was not because of deliberate refusal on the part of the sole shareholder but because of a misconception of the requirements for

registration. He once again said that the personal representatives could have, but did not, apply for rectification of the register by having their names put on the register. Mr. Tan then made the concession that the petitioners should have come before the Court and said that as the vital element of trust between the members had gone, the company should be wound up because it would be just and equitable to do so under s. 218 (1)(i). Instead, the petitioners asked for winding-up on the ground that membership was reduced to one. This was merely a guise. He then referred to the reason given by the petitioners for not attending the EGM on 21 October 1981, namely, the agenda was *ultra vires* the Court Order. He said that both the Orders of Court dated 15 September 1980 and 2 January 1981 should be read together and once this was done it was clear that the Court was only concerned with the holding of meetings and not with the agenda. He referred to Article 8 of the Memorandum and Articles of Association, which reads:

> The shares shall be under the control of the Directors who may allot and dispose of the same to such persons, on such terms and in such manner as they shall think fit.

He submitted the reason the petitioners gave for not attending the meeting was not justified. He accepted that the sole shareholder was throughout acting on the advice of solicitors and accountants. He said that the particular ground relied on by the petitioners could be construed as oppression which attracts the operation of s. 218 (1)(i) and s. 181 of the Act and cited p. 618 *Pennington,* 3rd Edn. He said there could no deadlock yet because there was no meeting. He accepted that in view of s. 150 and the Orders of Court dated 15 September 1980 and 2 January 1981 the sole shareholder had been wrongly advised and thought that he could act unilaterally. He submitted that if all the facts had been placed before the Court at the hearing of the petition for winding-up it could have acted under s. 221 (2)(f) or s. 221 (3) of the Act. The Court could then have ordered that the personal representatives be registered and warned them that they faced dire consequences in the event of a deadlock. The company, he said, was still making profits and providing funds to the widow so it would be unjust to wind up. In fact, all would benefit if the company is not wound up.

After giving the fullest consideration to all that was urged upon me by Mr. Tan, I arrived at the inevitable conclusion that there was no reason for me to depart from the decision I had earlier reached, namely, that the company should be wound up.

I do not propose to repeat myself but, suffice it to say that Mr. Tan had himself conceded that as the vital element of trust had ceased to exist as between the petitioners and the sole shareholder the former could have come before the Court and prayed for a winding up of the company on the ground that it would be just and equitable to do so by virtue of s. 218(1)(i) of the Act. He also conceded that the matters of which complaint had been made by the petitioners could be construed as oppression, which again would have enabled the Court to order a winding up of the company by virtue of s. 181 of s. 218(1)(i) of the Act. He also conceded that the number of shareholders of the company had been reduced to below the minimum of two and that despite this the company had continued to carry on business under the directions of the sole shareholder in violation of the provisions of s. 14(1) and s. 36 of the Act.

It seemed to me, that once the above concessions are recognised as being of primary importance, then, Mr. Tan's submissions must surely lose their sting for, what was he left with to argue about? Simply this: that because the petitioners were in a position to regularise the acts of misfeasance and non-feasance so as to ensure compliance with s. 14(1) of the Act following the death of the deceased, and yet did not do so, that affords a sort of licence

to the sole shareholder not only to flout the law but to abuse his position, and to abuse it criminally. The ultimate absurdity of this argument is that if upheld it would mean that two wrongs make a right. Reason and justice pointed to the conclusion that I could not possibly subscribe to it.

In these circumstances, I did not consider it necessary to exercise my powers by ordering a winding-up on the just and equitable ground under s. 218(1)(i) or on the ground of oppression under s. 181 of the Act, but, had it been necessary, I would have had no hesitation in doing so. I derive analogical support for this view from the decision of the House of Lords in *Ebrahimi v. Westbourne Galleries Ltd. & Ors.* [1972] 2 All ER 493 where it was held that if the total relationship of the parties exhibit the characteristics of a partnership, the Courts may hold a breakdown of mutual confidence among the members to be grounds for regarding a winding-up order as just and equitable.

In the result, I confirmed my Order granting this petition with costs but directed a stay pending further Order under the provisions of s. 243 of the Act, there being an appeal from my decision.

Also found at [1984] 1 CLJ 370